Supreme Court, U.S.
FILED
01728 MAY 22 2002
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

ELLETT BROTHERS, INC.,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,
ST. PAUL MERCURY INSURANCE COMPANY,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

THORNWELL F. SOWELL III
Counsel of Record
SOWELL GRAY STEPP
& LAFFITTE, L.L.C.
1310 GADSDEN STREET
COLUMBIA, SC 29201
(803) 929-1400

AMY HOWE
GOLDSTEIN & HOWE, P.C.
4607 ASBURY PLACE, N.W.
WASHINGTON, D.C. 20016
(202) 237-7543

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

55 pg

QUESTION PRESENTED

Did the Court of Appeals err when, contrary to the longstanding precedent of this Court, the practice of other courts of appeals, and constitutional principles of federalism, it made no effort to discern and apply state law in a diversity case, but instead relied on a "default rule" that it had allegedly established in an earlier case?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Ellett Brothers, Inc. was the appellant below.

The respondents in this Court, appellees below, are: United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc. and St. Paul Mercury Insurance Company.

Other entities named in the court of appeals' caption, but who neither participated in the court of appeals nor are respondents here, are International Insurance Company, RLI Insurance Company, Mount Hawley Insurance Company, United National Insurance Company, Defendants; and American Insurance Association, National Shooting Sports Foundation and National Association of Independent Insurers, Amici Curiae.

RULE 29.6 STATEMENT

No parent corporation exists, and no publicly held company owns 10% or more of the stock of Ellett Brothers, Inc.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding Below ii

Rule 29.6 Statement ii

Opinions Below 1

Jurisdiction 1

Statute Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. This is a diversity case initiated in state court and removed to federal court, and therefore the federal court is required to analyze and apply state substantive law 5

II. The Fourth Circuit's opinion fails to discern and apply South Carolina law and therefore creates federal common law in violation of the constitutional principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) 7

(1) The Court of Appeals has no authority to create any federal common law 8

(2) The Fourth Circuit's creation of its own common law rule of contract interpretation conflicts with every other United States Circuit Court of Appeals 9

(3) The respondents have been allowed to illegally forum-shop in violation of the *Erie* doctrine 11

III. Neither the opinion below nor the opinion in *Cincinnati Insurance Company v. Milliken* represents South Carolina law 12

(1) *Milliken* has been conclusively rejected, and furthermore, it disregards South Carolina law 13

(2) The Fourth Circuit's opinion directly contradicts South Carolina law 19

(3) The South Carolina Court of Appeals' decision in *Braswell v. Faircloth* rejects *Milliken* 21

IV. In sum, the Fourth Circuit has turned the *Erie* doctrine on its head 22

Conclusion 23

TABLE OF AUTHORITIES

CASES

Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.,
948 F.2d 1507 (9th Cir. 1991) 17, 18

AIU Ins. Co. v. Superior Court,
799 P.2d 1253 (Cal. 1990) 16

Allstate Insurance Co. v. Menards, Inc.,
285 F.3d 630 (7th Cir. 2002) 5, 10, 23

Anderson Dev. Co. v. Travelers Indem. Co.,
49 F.3d 1128 (6th Cir.1995) 18

Avondale Indus. Inc. v. Travelers Indem. Co.,
887 F.2d 1200 (2nd Cir.1989) 18

Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.,
625 A.2d 1021 (Md.1993) 13, 14, 15, 18, 20

Bituminous Cas. Corp. v. Vacuum Tanks, Inc.,
75 F.3d 1048 (5th Cir.1996) 18

Boeing Co. v. Aetna Cas. & Sur. Co.,
784 P.2d 507 (Wash. 1990) 15, 20

Braswell v. Faircloth,
387 S.E.2d 707 (S.C. Ct. App. 1989) 4, 6, 7, 21, 22

C.D. Spangler v. Indus. Crankshaft and Engineering Co., Inc.,
388 S.E.2d 557 (N.C. 1990) 16, 19

Cincinnati Insurance Co. v. Milliken & Co.,
857 F.2d 979 (4th Cir. 1988) . . . . . Passim

Coffey v. Foamex L.P., 2 F.3d 157 (6th Cir. 1993) . . . 9

Commissioner of Internal Revenue v. Bosch,
387 U.S. 456 (1967) 22

Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.,
842 F.2d 977 (8th Cir. 1988) . . . 3, 13, 15, 17, 18

Delta Air Lines, Inc. v. McDonnell Douglas Corp.,
503 F.2d 239 (5th Cir. 1974) 9

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) . . . . . Passim

Farmland Indus. Inc. v. Republic Ins. Co.,
941 S.W.2d 505 (Mo. 1997) 13, 17, 18

Forsyth v. Cessna Aircraft Co.,
520 F.2d 608 (9th Cir. 1975) 10

Gerrish Corp. v. Universal Underwriters Ins. Co.,
947 F.2d 1023 (2nd Cir.1991) . . . . . .

Gooding v. Wilson, 405 U.S. 518 (1972) 4

Greenville County v. Insurance Reserve Fund,
443 S.E.2d 552 (S.C. 1994) 15

Hays v. Mobil Oil Corp., 930 F.2d 96 (1st Cir.1991) . . 18

Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.,
944 F.2d 940 (D.C.Cir.1991) 18

Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co.,
118 F.3d 1263 (8th Cir. 1997) 17

Macon-Bibb County Industrial Authority v. Nord Bitumi, U.S., Inc.,
77 F.3d 417 (11th Cir. 1996) 10

Maryland Casualty Co. v. Armco, Inc.,
822 F.2d 1348 (4th Cir. 1987) . . . . . Passim

McCracken v. Gov't Employees Ins. Co.,
325 S.E.2d 62 (S.C. 1985) 19

Metro Wastewater Recl. Dist. v. Continental Cas. Co.,
834 F.Supp. 1254 (D.Col. 1993) 16

National Indem. Co. v. United States Pollution Control, Inc.,
717 F.Supp. 765 (W.D.Okla. 1989) 16

New Castle County v. Hartford Accident & Indem. Co.,
933 F.2d 1162 (3rd Cir.1991)
rev'd on other grounds,
New Castle County v. Hartford Accident & Indem. Co.,
970 F.2d 1267 (3rd Cir. 1992) 18

North Am. Specialty Ins. Co. v. Lapalme,
258 F.3d 35 (1st Cir. 2001) 9

Oriental Trading Co. v. Firetti,
236 F.3d 938 (8th Cir. 2001) 10

Poole v. Kelly, 854 F.2d 760 (D.C. Cir. 1992) 10

Port of Portland v. Water Quality Ins. Syndicate,
796 F.2d 1188 (9th Cir.1986) 18

Rosenfield v. Basquait, 78 F.3d 84 (2d Cir. 1996) 9

Salve Regina College v. Matthew, 499 U.S. 225 (1991) . 9

Sloan Construction Co. v. Central Nat'l Ins. Co.,
236 S.E.2d 818 (S.C. 1977) 18

South Carolina State Budget and Control Board v. Prince,
403 S.E.2d 643 (S.C. 1991) 7, 19, 20

State Farm Mut. Auto. Ins. Co. v. Pate,
275 F.3d 666 (7th Cir. 2001) 9

Stauth v. National Union Fire Ins. Co. of Pittsburgh,
236 F.3d 1260 (10th Cir. 2001) 10

Swift v. Tyson, 41 U.S. 1 (1842) 11

Truck Ins. Exchange v. Marks Rentals, Inc.,
418 A.2d 1187 (Md. 1980) 14

Van Buskirk v. Carey Canadian Mines, Ltd.,
760 F.2d 481 (3d Cir. 1985) 9

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746,
27 L.Ed. 2d 669 (1971) 5

STATUTES

28 U.S.C. § 1254(1) 1

OTHER AUTHORITY

Nancy W. Monts, INSURANCE COVERAGE FOR SUPERFUND CLAIMS: ARE RESPONSE COSTS RECOVERABLE DAMAGES?, 41 S.C.L.R. 871, 879 (1990) 21

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va.L.Rev. 1671 (1992) 12

19 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4503 at 24 (1996) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner Ellett Brothers, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 275 F.3d 384 (Pet. App. 4a- 16a). The order of the Court of Appeals denying petitioner's motion for certification of questions of law (Pet. App. 17a-19a) is unreported. The orders of the United States District Court for the District of South Carolina, Columbia Division, denying petitioner's motion for certification of question of law and granting respondents' motion for summary judgment (Pet. App. 25a; 20a-24a) are unreported. The decision of the Court of Appeals denying the petition for rehearing and rehearing *en banc* (Pet. App. 1a-3a) is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on December 28, 2001. A timely petition for rehearing and rehearing *en banc* was denied by that court on January 23, 2002. Chief Justice Rehnquist subsequently extended the time to file this petition to and including May 23, 2002. *See* App. No. 01-A764. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

No relevant constitutional or statutory provisions apply.

STATEMENT OF THE CASE

Petitioner Ellett Brothers is a South Carolina gun distributor insured under commercial general liability insurance policies written by the insurance company respondents. When sued by several municipalities in California and the NAACP in New York for the wrongful distribution of handguns, petitioner sought a defense from the insurance companies.[1] When the insurance companies denied a defense, Ellett Brothers brought an action in state court in South Carolina, seeking a declaratory judgment that respondents were obligated to defend the lawsuits and indemnify petitioner. The case was removed to federal court in South Carolina, which is required to apply South Carolina substantive law because the insurance policies either were issued in South Carolina or insured a risk located in South Carolina.

---

[1] The insurance policies state: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policies define several pertinent terms, but the term "damages" is not defined in any of the policies.

The underlying lawsuits allege that Ellett Brothers' negligent marketing and distribution of firearms have caused injuries, death, and other damages to people and property. As a result of these injuries and deaths, the municipal lawsuits seek injunctive and declaratory relief, pre-judgment and post-judgment interest, civil penalties, restitution and disgorgement, costs and attorneys' fees, and "such other relief as the Court deems equitable and just." The lawsuit by the NAACP seeks injunctive and declaratory relief, the payment by Ellett Brothers into a "fund for education, supervision and regulation" of the gun industry, attorneys' fees and costs, and "such other relief as the Court deems just and proper."

Ellett Brothers sought to have the federal district court certify dispositive state law questions to the South Carolina Supreme Court, but that motion was denied (Pet. App. 25a-26a), and summary judgment was granted to the respondent insurance companies. In its opinion, the district court made no attempt to discern or apply South Carolina law, but instead found itself bound by a thirteen year old Fourth Circuit opinion, *Cincinnati Insurance Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988), in which the court of appeals – faced with the absence of any South Carolina case law on point – had attempted to predict South Carolina law. In that case, the Fourth Circuit relied upon an earlier decision in *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which interpreted Maryland law, and the Eighth Circuit's decision in *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988), which interpreted Missouri law, to conclude that the meaning of the word "damages" did not include claims for equitable relief. The district court, instead of analyzing South Carolina law, relied on the Fourth Circuit's opinion in *Milliken* and held that the respondent insurance companies do "not have a duty to defend plaintiff in the four pending lawsuits because the relief sought in those cases is equitable in nature and, therefore, does not constitute damages."

On appeal, the Fourth Circuit also refused a motion to certify dispositive state law questions to the South Carolina Supreme Court. *See* Pet. App. 17a-19a. In a divided opinion, the Fourth Circuit similarly rejected petitioner's claim for declaratory relief. Like the district court, the majority made no meaningful attempt to discern or apply South Carolina law to petitioner's claims. Instead, it relied on its holding in *Milliken* which it described as allegedly creating a "default rule" of contract interpretation whereby the term "damages" in insurance contracts will be interpreted so as not

to reference equitable relief. Specifically, the court stated: "However, *our authority ... to create a default rule of contract interpretation* whereby, in the absence of any contrary intent by the parties, the term 'damages' in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable." Accordingly, the court of appeals held that the facts of the complaint must allege that Ellett owes legal damages, and that no such facts are alleged here.

Judge Michael rejected the majority's reliance on *Milliken* and any "default rule" created therein, emphasizing that "[t]o the extent that South Carolina deviates from or contradicts our holding in *Milliken*, we must defer to the courts of South Carolina. *See Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972)." Pet. App. 12a. Moreover, he explained, although the majority opinion "cites *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), as an indication that the legal/equitable distinction in *Milliken* has been reaffirmed by the South Carolina courts," in fact "the ultimate holding in *Braswell* appears to *conflict* with *Milliken's* legal/equitable distinction." Pet. App. 12a (emphasis added). Specifically, Judge Michael concluded that "Braswell in effect rejects *Milliken's* categorical rule excluding equitable relief from the term 'damages' because Braswell awarded coverage for environmental cleanup costs that the trial court had categorized as equitable relief." Pet. App. 14a.

Ellett Brothers' petition for rehearing and petition for rehearing *en banc* were denied on January 23, 2002 .

REASONS FOR GRANTING THE WRIT

I. This is a diversity case initiated in state court and removed to federal court, and therefore the federal court is required to analyze and apply state substantive law.

This is a diversity case initiated in state court and removed to federal court. As such, the federal court is indisputably required to discern and apply state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Notwithstanding this fundamental principle, which is reflected in the long-standing precedents of this Court and the practice of other courts of appeals, in this case the Fourth Circuit made no meaningful attempt to apply South Carolina rules of insurance contract construction to petitioner's claims for relief. Instead, the Fourth Circuit has admittedly created its own federal common law "default rule" of construction, thereby violating basic principles of federalism and ignoring South Carolina law.

"*Erie* requires that the federal court follow an analytical path that ensures that the law applied in federal proceedings is the law that '*ultimately* would be applied were the case to be litigated in the state courts.'" *Allstate Insurance Co. v. Menards, Inc.*, 285 F.3d 630 (7th Cir. 2002). "[T]he potential for significant intrusion, sometimes with disastrous results, counsels that the task be undertaken with great care, thoroughness and a full realization of the impact that the process, even when executed adroitly, has on 'Our Federalism.' *See Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971)." *Id.* at 638. In this case, the task was not undertaken at all. Neither the district court nor the Fourth Circuit made any meaningful attempt to discern South Carolina law. The district court simply

deferred to the court of appeals who undertook not to identify South Carolina law, but instead to unconstitutionally create its own rule of federal common law.

The Fourth Circuit's failure to make any effort to discern and apply South Carolina law in this case was particularly injurious insofar as the majority's reliance on the "default rule" allegedly established in *Milliken* led the majority to reach a result that not only did not reflect, but was in fact *contrary* to, South Carolina law. First, the South Carolina Supreme Court has never recognized any "default rule of contract interpretation" but instead, has consistently followed rules of interpretation which support a conclusion that where the insurer does not make clear its intention to *exclude* equitable claims, they are among those claims entitled to a defense. Second, the South Carolina Court of Appeals has made it clear in *Braswell* that *Milliken* is not the law of South Carolina. Third, even if the Fourth Circuit had in fact established a "default rule" in *Milliken*, the majority's reliance on that rule is especially problematic because the *Milliken* rule has been substantially undermined by subsequent developments in the state laws on which the *Milliken* court relied. Finally, by creating a conflict between contract law as applied in South Carolina courts on the one hand, and contract law as applied in federal diversity cases arising out of South Carolina on the other hand, the Fourth Circuit's opinion raises the same evils that *Erie* sought to avoid, including the opportunity for forum shopping.

II. The Fourth Circuit's opinion fails to discern and apply South Carolina law and therefore creates federal common law in violation of the constitutional principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It is beyond dispute that in this case, the federal court is required to carefully analyze and apply South Carolina law. Notwithstanding this obligation, the Fourth Circuit's majority opinion merely relied on a "default rule" of contract interpretation allegedly established in *Milliken*.[2] The majority clearly acknowledges this reliance:

> However, our authority therein [in *Cincinnati Insurance Co. v. Milliken & Co.*] to create a default rule of contract interpretation whereby, in the absence of any contrary intent by the

---

[2] Even putting aside the majority's failure to seek to discern and apply South Carolina law to petitioner's claims, the majority's reliance on *Milliken's* "default rule" is curious insofar as no such rule was ever established in *Milliken*. Instead, the Fourth Circuit relied in *Milliken* upon Maryland and Missouri law to fashion an opinion that has subsequently been discredited by the state courts in both Maryland and Missouri. *See infra* at 13-19. Furthermore, as stated in Judge Michael's concurring opinion, the conclusion in *Milliken* has also been repudiated by the South Carolina Court of Appeals in the case of *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989). *See infra* at 21-22. *Milliken* also contradicts well settled rules of insurance contract construction repeatedly stated by the South Carolina Supreme Court, including the rules of construction set out in *South Carolina State Budget and Control Board v. Prince*, 403 S.E.2d 643 (S.C. 1991), which are ignored by the Fourth Circuit. *See infra* at 19-20.

> parties, the term 'damages' in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable and, here, that default rule of contract interpretation is sufficient to sustain the district court summary judgment, because there is nothing in the contract between Ellett and its insurers that evidences an intention to include equitable, in addition to legal, claims for relief, among those as against which Ellett's insurers must defend.

To the contrary, it is plain in light of *Erie* that the court of appeals has no authority to *create* a default rule of contract interpretation or any other rule of contract interpretation not already recognized by the South Carolina Supreme Court.

(1) The Court of Appeals has no authority to create any federal common law.

"There is no federal general common law." *Erie*, 304 U.S. at 78. "It is impossible to overstate the importance of the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*. It does not announce a technical doctrine of federal court procedure or jurisdiction. Rather, it goes to the heart of the relationship between the federal government and the states, and returns to the states a power that for nearly a century had been exercised by the federal government." 19 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4503 at 24 (1996). In *Erie*, "Justice Brandeis states only that no clause in the Constitution purports to confer upon the federal courts the power to declare substantive rules of common law applicable in a state, and that the federal courts 'have invaded rights which in our opinion are reserved by the Constitution to the several States.'" 19 Wright, *et al.*, *supra*

§ 4505 at 52. The narrow constitutional holding in the *Erie* decision is that the federal courts have no authority to declare substantive, common law rules of general applicability. *Id.* Instead, as this Court has repeatedly explained, "*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary." *Salve Regina College v. Matthew*, 499 U.S. 225, 226 (1991).

(2) The Fourth Circuit's creation of its own common law rule of contract interpretation conflicts with every other United States Circuit Court of Appeals.

Contrary to the Fourth Circuit's opinion in petitioner's case, every other circuit has consistently followed the *Erie* doctrine and, in diversity cases, applied the relevant, applicable state law. *See, e.g.*, *North Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37 (1st Cir. 2001) ("In this diversity case, we look to state law . . . for the substantive rules of decision."); *Rosenfield v. Basquait*, 78 F.3d 84, 88 (2d Cir. 1996) ("Because state law supplies the rules in diversity-of-citizenship cases . . . New York law, including its statute barring the testimony of certain interested witnesses, must be given effect."); *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985) ("Federal courts sitting in diversity cases must apply the substantive laws of the states in which they sit ...."); *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 243 (5th Cir. 1974) (following state conflict of law rules in diversity case); *Coffey v. Foamex L.P.*, 2 F.3d 157, 160 n.1 (6th Cir. 1993) ("This court, in exercising diversity jurisdiction, applies the substantive state law in accordance with *Erie R. Co. v. Tompkins*."); *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001) ("In fulfilling the mandate of

Erie . . . a United States district court sitting in diversity . . . must apply the law of the state as it believes the highest court of the state would apply it if the issue were presently before that tribunal."); *Oriental Trading Co. v. Firetti*, 236 F.3d 938, 944 (8th Cir. 2001) ("In this diversity action, state law governs issues of substantive law."); *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 611 (9th Cir. 1975) (applying state conflict of law provisions in diversity case); *Stauth v. National Union Fire Ins. Co. of Pittsburgh*, 236 F.3d 1260, 1267 (10th Cir. 2001) ("As a federal court sitting in diversity of citizenship litigation, our duty under *Erie v. Tompkins* principles is of course to conform to [Kansas's] substantive law."); *Macon-Bibb County Industrial Authority v. Nord Bitumi, U.S., Inc.*, 77 F.3d 417, 419 (11th Cir. 1996) ("This is a diversity case; thus, under *Erie Railroad Co. v. Tompkins*, Georgia law is applied to decide the substantive issues."); *Poole v. Kelly*, 854 F.2d 760, 763 (D.C. Cir. 1992) (holding that, although the District is not a state, the principles of Erie are to be followed by federal courts adjudicating diversity actions in the District of Columbia).

This petition should be granted because the Fourth Circuit's opinion conflicts with every circuit in the country, all of whom have consistently followed *Erie*. *See Allstate Insurance Co. v. Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002) ("In sum, we adhere today to the general rule, articulated and applied throughout the United States, that, in determining the content of state law, the federal courts must assume the perspective of the highest court in that state and attempt to ascertain the governing substantive law on the point in question.")

(3) The respondents have been allowed to illegally forum-shop in violation of the *Erie* doctrine.

Erie refuted the construction of the Rules of Decision Act previously set out in *Swift v. Tyson*, 41 U.S. 1 (1842), primarily because it allowed inequitable forum-shopping. As stated by Justice Brandeis:

> *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizens. Thus, the doctrine rendered impossible equal protection of the law.

304 U.S. at 74-75.

In this case, a South Carolina corporation sought the protection of its state's laws regarding the construction of a South Carolina insurance contract issued on a South Carolina risk. After suit was initiated in South Carolina state court, the respondent insurance companies removed the case to federal court. In the end, this forum-shopping afforded the respondents an outcome they could not have achieved in a South Carolina court. Instead, this case was decided upon a federally-created "default rule" never recognized by the South Carolina Supreme Court or any other South Carolina court. In fact, as pointed out by Judge Michael in his opinion below, South Carolina courts have expressly refuted the conclusion in the majority opinion. As a result, the ultimate inequity has been created. While diversity jurisdiction was created to assure that non-citizens were not unfairly treated in local

venues, the result in this case is that a South Carolina resident is not afforded the protection of South Carolina law.

The implications of this "lawmaking" by the Fourth Circuit are obvious. "Until corrected by the state supreme court, such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court; they may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent. Indeed, some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va.L.Rev. 1671 (1992).

III. Neither the opinion below nor the opinion in *Cincinnati Insurance Company v. Milliken* represents South Carolina law.

The Fourth Circuit has never analyzed the applicable South Carolina law or attempted to discern how the Supreme Court of South Carolina would interpret the undefined term "damages" in the relevant context. Instead, in *Milliken*, the court simply concluded that South Carolina law is not different from Maryland law, a proposition since conclusively refuted by the Maryland Court of Appeals. In the majority opinion below, instead of recognizing the fallacy in *Milliken*, the Fourth Circuit has concluded that it created a federal "default rule" in *Milliken* and now applies that rule to affirm the district court's reliance on *Milliken*. The most striking aspect of the majority opinion below is that the Fourth Circuit makes no pretense of analyzing or discerning South Carolina law. Instead, it continues to rely upon, and compounds the

fallacy of, the 1988 *Milliken* opinion.

(1) *Milliken* has been conclusively rejected, and furthermore, it disregards South Carolina law.

Milliken resorted to federal interpretations of Maryland and Missouri law in an effort to predict how South Carolina courts would resolve a novel issue of South Carolina law. More specifically, *Milliken* relied upon *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which interpreted Maryland law, and *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-87 (8th Cir. 1988) ("NEPACCO"), which interpreted Missouri law. Based upon these two decisions, *Milliken* concluded that the meaning of the word "damages" in an insurance policy did not include claims for equitable relief.[3] However, in *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md.1993) and *Farmland Indus. Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 510 (Mo. 1997), the highest courts of Maryland and Missouri rejected *Armco* and *NEPACCO* and therefore made *Milliken* a nullity.

In *Armco*, the question presented was "whether the claim brought against Armco in Missouri constitutes a claim for 'damages' as defined in the insurance agreement between Armco and Maryland Casualty." In answering this question, the Fourth Circuit, applying Maryland law, recognized that "[i]t is black-letter law that the terms of an insurance policy

---

[3] The *Milliken* court made no effort to analyze South Carolina law but instead concluded that it perceived "no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies that should cause us to deviate from *Armco* and *Mraz*." 857 F.2d at 980-981.

are to be construed according to the meaning a reasonably prudent layman would infer." 822 F.2d at 1352. However, the court continued its analysis by noting that Maryland law has "adopted the somewhat narrow, technical definition of damages." Thus, the Fourth Circuit held that "[t]he best approach in construing the term 'damages' as contained in this insurance contract is to afford it the *legal, technical meaning*[.]" *Id.* (emphasis added).

The court addressed the same issue in *Milliken* and began its analysis by revisiting the *Armco* decision. Perceiving no material distinctions between South Carolina and Maryland law, but analyzing neither, the court followed the reasoning of *Armco*.[4] 857 F.2d at 980. Although the *Milliken* court correctly noted that absent ambiguity, South Carolina law interprets the language of an insurance policy according to its plain, ordinary, and popular meaning, the court proceeded to define the term "damages" in the "insurance context" and according to its "legal meaning":

> In the insurance context, the word "damages" is not ambiguous. It means legal damages.

---

[4] The *Milliken* court reached this conclusion despite the fact that Maryland courts, unlike their South Carolina counterparts, "have consistently rejected the rule that insurance policies are always to be construed most strictly against the insurer." *Truck Ins. Exchange v. Marks Rentals, Inc.*, 418 A.2d 1187, 1191 (Md. 1980). However, given the premise that there is no "material distinction" between South Carolina and Maryland law in the construction and interpretation of insurance policies, a court, if persuaded at all by *Milliken*, would now follow Maryland law as enunciated in *Bausch & Lomb*, 624 A.2d at 1033 ("The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity.").

> *Northeastern Pharmaceutical*, 842 F.2d at 985-87; *Armco,* 822 F.2d at 1352. As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay 'all sums which the insured shall become legally obligated to pay as damages' would not cover claims for which the insured is equitably obligated to pay.

Id. at 981. Within this technical context, the court upheld the district court's ruling that Cincinnati Insurance was not obligated to cover equitable claims.[5]

Subsequent decisions by the highest courts in Maryland and Missouri demonstrate that both *Armco* and *NEPACCO* misapplied the law of their respective states. In *Bausch & Lomb*, Maryland's highest court recognized that "[t]o the extent it suggests that the term 'damages' imports a distinctively legal meaning in insurance matters, *Armco*

---

[5] As noted in *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 511-515 (Wash. 1990), this holding conflicts with that of 56 judges across the country who agree that "damages" includes equitable claims. Furthermore, as the South Carolina Supreme Court has pointed out, "[t]hat different courts have construed the language of an insurance policy differently is some indication of ambiguity." *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552, 553 (S.C. 1994).

misperceives the law of Maryland." *Id.* at 1032.[6] As the Maryland Court of Appeals explained:

> 'Damages' in the common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity. Absent an express provision in the document itself, insurance policy-holders surely do not anticipate that coverage will depend on the mode of relief, i.e a cash payment rather than an injunction, sought by an injured party.

---

[6] Other courts also recognize the incongruities of *Armco*. As the North Carolina Supreme Court noted, "[I]n *Armco*, the Fourth Circuit did not use the 'ordinary' meaning of the word damages to deny recovery." *C.D. Spangler v. Indus. Crankshaft and Engineering Co., Inc.*, 388 S.E.2d 557, 566, n. 11 (N.C. 1990). The North Carolina Supreme Court went on to state that "the better reasoned decisions find that the term 'damages' as used in the coverage provisions of liability policies include the types of expenditures under consideration." *Id.* at 556; *see also AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1271 (Cal. 1990) ("In our view, the *Armco* approach to what constitutes 'damages' for insurance policy purposes is unduly narrow."); *Metro Wastewater Recl. Dist. v. Continental Cas. Co.*, 834 F.Supp. 1254, 1259 (D.Col. 1993) (Recognizing that *Armco* has been "severely criticized by courts interpreting the laws of states that adhere to the plain meaning rule of contract interpretation."); *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F.Supp. 765, 766 (W.D.Okla. 1989) (Rejecting *Armco* and holding that "the better approach is to construe the meaning of damages in its ordinary and popular sense."). Thus, the underlying legal foundation relied upon by the *Milliken* court was incorrect.

Id. at 1033. Similarly, in *Farmland Industries, Inc. v. Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997), the Missouri Supreme Court held that the Eighth Circuit's prediction in *NEPACCO* was wrong.

> The *NEPACCO* court misconstrues and circumvents Missouri law. The cases upon which the *NEPACCO* court relies for the proposition that "damages" distinguishes between claims at law and claims at equity are not persuasive. The cases do not determine the ordinary meaning of "damages" as required by Missouri law. Furthermore, no authority allows this Court to define words "in the insurance context." To give words in an insurance contract a technical meaning simply by reading them "in the insurance context," would render meaningless our law's requirement that words be given their ordinary meaning unless a technical meaning is plainly intended.

Id. at 510.[7]

---

[7] *See also Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co.*, 118 F.3d 1263, 1269 (8th Cir. 1997) (Recognizing that *NEPACCO* misapplied Missouri law and holding "that under Nebraska law the term 'as damages' can fairly be interpreted in more than one way, and is therefore ambiguous. Being ambiguous, we interpret the term 'as damages' to include both legal damages and equitable relief because that interpretation favors the insured."); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507, 1512 n. 3 (9th Cir. 1991) (Holding that *Armco* and *NEPACCO* are not persuasive authority under Idaho law as they explicitly reject the ordinary person's view of the term "damages,"

Based upon *Armco*, and the Eighth Circuit's decision in *NEPACCO*, *Milliken* concluded that the word "damages" does not include claims for equitable relief. However, *Bausch & Lomb* and *Farmland Industries* collapsed *Milliken's* legal foundation and confirmed that the term "damages" includes claims for equitable relief.

More importantly, *Milliken's* construction of "damages" in the "insurance context" disregards the law of South Carolina, which mandates the application of the plain and ordinary meaning to terms in an insurance policy. *Sloan Construction Co. v. Central Nat'l Ins. Co.*, 236 S.E.2d 818, 819 (S.C. 1977). As the vast body of case law demonstrates, a reasonable person reading the policy would not make the technical distinction between legal and equitable damages

---

and that *Milliken* merely adopts *Armco's* and *NEPACCO'S* reasoning without any analysis of its own.). Furthermore, most federal courts construing the laws of various states have held that equitable claims are covered damages under CGL policies. *See Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1053 (5th Cir.1996) (Texas law); *Anderson Dev. Co. v. Travelers Indem. Co.*, 49 F.3d 1128, 1133 (6th Cir.1995) (Michigan law); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 946-47 (D.C.Cir.1991) (Missouri law); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507, 1511-15 (9th Cir.1991) (Idaho law); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1188 (3rd Cir.1991) (Delaware law) rev'd on other grounds, *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267 (3rd Cir. 1992); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1029-30 (2nd Cir.1991) (Vermont law); *Hays v. Mobil Oil Corp.*, 930 F.2d 96, 100-02 (1st Cir.1991) (Massachusetts law); *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2nd Cir.1989) (New York law); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir.1986) (Oregon law).

asserted in *Milliken*. A technical definition of this sort contradicts the law of South Carolina. As *Spangler* and other cases countrywide demonstrate, the plain and ordinary meaning of the word "damages" includes claims for equitable relief.

Furthermore, *Milliken* construes an undefined term in a manner to defeat coverage. This construction is contrary to the general rules governing the construction of insurance policies in South Carolina and the specific holding of the South Carolina Supreme Court in *Prince* that when a policy is susceptible to more than one reasonable interpretation, one of which would provide coverage, a court *must* hold as a matter of law in favor of coverage. *Prince*, 403 S.E.2d at 647. The so-called "default rule" now "created" by the Fourth Circuit has never been adopted by the South Carolina Supreme Court. Instead, it is clear from *Prince* that in the event of an insurer's failure (or default) to make the policy clear, it must be construed *against* the insurer.[8]

(2) The Fourth Circuit's opinion directly contradicts South Carolina law.

Under South Carolina law, when a policy is susceptible to more than one reasonable interpretation, one of

---

[8] *Prince* also recognized the well-settled South Carolina principle that insurance contracts are generally construed against the party who prepares them and liberally in favor of the insured, *McCracken v. Gov't Employees Ins. Co.*, 325 S.E.2d 62 (S.C. 1985), and that a policy which does not limit recovery to actual or compensatory damages, must be read as encompassing other damages. Consequently, it is clear that South Carolina law does not, in the absence of a restricting definition, limit the term "damages" to *compensatory* damages.

which would provide coverage, a court must hold as a matter of law in favor of coverage. *Prince*, 403 S.E.2d at 647. In light of the vast number of cases that have rejected St. Paul's interpretation of the term "damages," it is incomprehensible that Ellett Brothers' interpretation of the term is not at least one reasonable interpretation.[9] Clearly, the term "damages" is susceptible of more than one reasonable interpretation where it is not defined in the St. Paul policy and a majority of courts have extended coverage to both claims in law and equity. Under these circumstances and the rules of construction enunciated by the South Carolina Supreme Court in *Prince*, Ellett Brothers is entitled to coverage as a matter of law.

---

[9] *See, e.g., Boeing Co.*, 784 P.2d at 511, where the court noted: "Numerous federal and sister-state decisions (counsel at oral argument stated over 56 judges across the country) agree that 'damages' include cleanup costs." The Washington Supreme Court also noted that, as here, there are long sections of the contracts defining all of the key terms but no defining words about damages. *Id. See also Bausch & Lomb*, 625 A.2d at 1030, noting that the majority of state appellate courts have construed the term "damages" to include both monetary compensation to government agencies or aggrieved third parties and the expense of complying with environmental injunctions. The *Bausch & Lomb* court also noted: "Nowhere in the contract is there any express indication that the parties wished to ascribe a special or technical meaning to the term 'damages.' Unlike many other terms used throughout the document, the word is not listed in the policy's definitions section with which the contract begins." *Id.* at 1031.

(3) The South Carolina Court of Appeals' decision in *Braswell v. Faircloth* rejects *Milliken*.

Finally, the Fourth Circuit's failure to discern and apply South Carolina law, and to rely instead on *Milliken*, carries significant consequences insofar as *Milliken* has been rejected by the South Carolina Court of Appeals in *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), which expressly conferred coverage for equitable claims.

In *Braswell*, a storage tank valve ruptured, and chemicals spilled onto a field adjacent to the tank. The South Carolina Department of Health and Environmental Control issued an administrative consent order requiring the owner to clean up the existing damage. The Environmental Protection Agency subsequently issued its own order requiring the removal of other stored chemicals, which had not caused any damage.

The applicable insurance policy in *Braswell* obligated the insurer to pay "all sums which the Insured shall become legally obligated to pay as damages because of property damage to which this insurance applies caused by an occurrence." 387 S.E.2d at 710. While the court concluded that there was no coverage for the cost to remove "stored chemicals which had not yet caused physical injury to property," it held "that an occurrence causing property damage did result . . . as to the spill of the 1000 gallons of chemicals and only as to the . . . damages directly related to the contamination of the land by this spill." *Id.* at 711. Consequently, the court held that the costs associated with rectifying this property damage *were covered* under the policy. Thus, *Braswell* directly contradicts the Fourth Circuit's holding in *Milliken*. *See*, Nancy W. Monts, INSURANCE COVERAGE FOR SUPERFUND CLAIMS: ARE

RESPONSE COSTS RECOVERABLE DAMAGES?, 41 S.C.L.R. 871, 879 (1990).

As stated by Judge Michael below, *Braswell* refutes the legal/equitable distinction made in *Milliken*, but this fact is entirely disregarded in the majority opinion. "'An intermediate appellate state court * * * is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Accordingly, the Fourth Circuit was not at liberty to ignore *Braswell* and fashion its own federal common law.

IV. In sum, the Fourth Circuit has turned the *Erie* doctrine on its head.

Neither the district court nor the court of appeals has made any attempt to follow the constitutional principles in *Erie*. First, the district court simply relied on the Fourth Circuit's opinion in *Milliken*, which has been soundly refuted by state courts in Maryland, Missouri, and virtually every other state in the country. Second, the Fourth Circuit, in its majority opinion, does not bother to recognize that *Milliken*, and its premise based on Maryland and Missouri law, have been soundly rejected by the state courts who have authority, under our federal system, to make decisions about state law. Third, when faced with the proposition that *Milliken* is bad law, the Fourth Circuit makes no attempt to analyze or discern the applicable South Carolina law. Instead, the Fourth Circuit, by its own words, declares that it has created a default rule, which has never been recognized by the South Carolina Supreme Court or any other South Carolina state court. Last, the Fourth Circuit's majority opinion contains no

citation to any South Carolina case that recognizes a "default rule" of insurance contract interpretation. The court of appeals has "created" a rule of contract construction that produces a federal result. The *Erie* doctrine does not allow such a result in a diversity case.

If the Fourth Circuit's opinion is allowed to stand, it will create a result that would not have occurred if this case had not been removed and therefore "shopped" to the federal court in order to get an unconstitutional "federal" result. This and other attempts by the Fourth Circuit to create federal common law will not only pervert individual outcomes but also have the potential to pervert an entire body of law. "[T]here is a significant impact on the health of our federalism as federal courts interpret, with increasing frequency, issues of state law. As the same author [Judge Sloviter] pointed out, there is some evidence that federal courts are not the best prognosticators of the future course of state doctrinal issues. Unless and until corrected, these missteps by federal courts can have a grave impact on the principled and orderly growth of state law principles." *Menards*, *supra* at 637-638.

CONCLUSION

The Fourth Circuit has not taken the care or thoroughness required of an *Erie* analysis and therefore has violated "Our Federalism." Moreover, its failure to seek to discern and apply South Carolina law is directly contrary to the practice of other courts of appeals and carries potentially serious consequences well beyond the facts of petitioner's case. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Thornwell F. Sowell, III
(Counsel of Record)
SOWELL GRAY STEPP &
LAFFITTE, L.L.C.
1310 Gadsden Street
Columbia, South Carolina 29211
(803) 929-1400

Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

Attorneys for Petitioner Ellett Brothers, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533
CA-00-1269-3-19

[Filed January 23, 2002]

Ellett Brothers, Incorporated,
Plaintiff-Appellant

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants

American Insurance Association;
National Shooting Sports Foundation;
National Association of Independent Insurers,
Amici Curiae

Ellett Brothers, Incorporated,
Plaintiff-Appellee

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ _____
Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533

[Filed, December 28, 2001]

Ellett Brothers, Incorporated,
Plaintiff-Appellant,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Ellett Brothers, Incorporated,
Plaintiff-Appellee,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Appeals from
United States District Court
for the District of South Carolina, at Columbia
Dennis W. Shedd, District Judge
(CA-00-1269-3-19)

JUDGES:

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges. Judge Luttig wrote the opinion, in which Judge Wilkinson joined. Judge Michael wrote an

opinion concurring in part and concurring in the judgment.

OPINION

LUTTIG, Circuit Judge:

Ellett Brothers, a handgun manufacturer, is a named defendant in four lawsuits. In three of these lawsuits, the plaintiffs are California municipalities who allege that Ellett's marketing of handguns creates public and private nuisances and violates the California Business and Professions Code. The municipalities request injunctive relief to abate the nuisances and to prevent violations of the Business and Professions Code, restitution to the public of funds obtained in violation of the Code, disgorgement of profits acquired by violating the Code, civil penalties for violating the Code, and costs of suit. One of these three complaints, brought by southern California municipalities, also requests attorneys' fees and "further relief as the Court deems equitable and just." J.A. at 474. The California municipalities do not seek compensatory or punitive damages.

In the fourth lawsuit, the NAACP alleges that Ellett created and maintained an illegal secondary market for guns. J.A. at 587-89. It seeks an injunction requiring Ellett to change its marketing practices, an injunction requiring Ellett to contribute to a fund to supervise gun dealers, attorneys' fees, and "further relief as this Court deems just and proper." J.A. at 594-96. The NAACP similarly does not seek compensatory or punitive damages.

Ellett's commercial general liability policy obligates its insurers to pay "those sums that the insured becomes legally

obligated to pay as damages because of 'bodily injury' or 'property damage'" and to defend Ellett "against any 'suit' seeking those damages." J.A. at 190. Ellett seeks a declaratory judgment that its insurers must defend the above-referenced lawsuits and indemnify Ellett. The district court, concluding that the California municipalities and the NAACP seek only equitable relief, and not damages, against Ellett, granted summary judgment to the insurers on the duty to defend claim. J.A. 163- 64. The district court also allowed Ellett to dismiss voluntarily its indemnity claim against its insurers pursuant to Fed. R. Civ. P. 41. J.A. at 123.

For the reasons that follow, we affirm.

I.

In appeal of the district court's summary judgment to Ellett's insurers, Ellett argues that the term "damages" is susceptible to more than one reasonable interpretation and that the district court therefore erred in construing the term as necessarily limited to claims for "legal" relief, as opposed to claims for either "legal" or "equitable" relief.

We have previously held that the term "damages" in an insurance contract unambiguously means legal damages, and that "[a]s a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief." *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 981 (4th Cir. 1988). *See also Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707, 710-11 (S.C. Ct. App. 1989) (citing *Milliken* with approval). We may well have been without authority, in the context of the single contractual dispute at issue in *Milliken*, to so define the term "damages" for all

contracts *in futuro*, as each contract is to be interpreted according to the intent of the parties. However, our authority therein to create a default rule of contract interpretation whereby, in the absence of any contrary intent by the parties, the term "damages" in insurance contracts will be interpreted so as not to reference equitable relief, would seem unassailable. And, here, that default rule of contract interpretation is sufficient to sustain the district court's summary judgment, because there is nothing in the contract between Ellett and its insurers that evidences an intention to include equitable, in addition to legal, claims for relief, among those as against which Ellett's insurers must defend.

Ellett makes much of the fact that "damages" is not defined in the policy, Appellant's Br. at 21-22, and that South Carolina insurance contracts are generally construed against the party that prepares them and liberally in favor of the insured. *McCracken v. Government Employees Ins. Co.*, 284 S.C. 66, 325 S.E.2d 62 (1985). However, because neither the South Carolina courts nor the parties to this contract have evinced any intent to deviate from the default rule established in *Milliken*, we hold that the term "damages," as used in this contract, does mean legal damages only, and therefore does not extend to claims for equitable relief.

II.

As to whether the four lawsuits against Ellett seek legal damages, as found by the district court, under South Carolina law a liability insurance company's obligation to defend its insured is determined by the allegations of the underlying complaint. *See R.A. Earnhardt Textile Mach. Div., Inc. v. South Carolina Ins. Co.*, 277 S.C. 88, 282 S.E.2d

856, 857 (S.C. 1981). If the suit includes any cause of action covered by the policy, the insurer must defend, even if the suit joins other causes of action beyond the policy's scope. *See Town of Duncan v. State Budget & Control Board*, 326 S.C. 6, 482 S.E.2d 768, 774 (S.C. 1997).

We have no difficulty concluding that none of the complaints seeks "damages" against Ellett. Neither the California municipalities nor the NAACP seek compensation for past injuries. Although they seek money from Ellett in the form of restitution, disgorgement, civil penalties, attorney's fees, cost of suit, and (in the NAACP suit) contribution to a fund to monitor gun dealers, none of these constitutes "damages." Restitution and disgorgement require payment of the defendant's ill-gotten gain, not compensation of the plaintiff's loss. This court has described restitution as an "equitable remedy." *See Milliken*, 857 F.2d at 980. And civil penalties, likewise, are not "damages" payable to the victim, but fines or assessments payable to the government. The NAACP's proposed fund to monitor gun dealers is forward-looking, prospective relief -- not compensation for past injuries inflicted.

The contract itself distinguishes costs and attorneys' fees from "damages," by obligating the insurers to pay these amounts only if the insurer was required to defend the suit in the first place. J.A. 551. The same is true for pre-judgment and post-judgment interest. *Id.* These cannot be included within the meaning of "damages" in this contract.

Finally, although two of the complaints request "such further relief as this court deems just," such language does not invoke the insurer's duty to defend. Under South Carolina

law, the facts of the complaint must allege that Ellett owes legal damages, *Earnhardt*, 282 S.E.2d at 857, and no such facts are alleged here. A prayer for "such further relief" is not a factual allegation supporting a claim for legal damages.

III.

The district court also granted Ellett's motion to dismiss without prejudice its indemnity claim against its insurers, holding that the claim was not ripe and that Ellett could be irreparably harmed with respect to the underlying suits. J.A. at 123. The insurers cross-appeal, arguing that this was error and that they were entitled to summary judgment on the indemnity claim.

A plaintiff's motion to voluntarily dismiss a claim should not be denied absent plain legal prejudice to the defendant, *see Andes v. Versant Corp.* A district court's decision to grant such a motion is reviewed for abuse of discretion, *see Davis v. USX Corp.*, 819 F.2d 1270 (4th Cir. 1987). We hold that the district court did not abuse its discretion in dismissing Ellett's indemnification claim without prejudice. First, under South Carolina law, while the duty to defend is based on the allegations in the complaint, *see Earnhardt*, 282 S.E.2d at 857, the duty to indemnify is based on evidence found by the factfinder, *see Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 476 S.E.2d 708, 711 (S.C. Ct. App. 1986). Because no findings of fact have been made in the four lawsuits against Ellett, the indemnity claim is not ripe and the district court correctly dismissed it. Moreover, the insurers will not be irreparably harmed by granting Ellett's motion to voluntarily dismiss its indemnity complaint, as the prospect of a subsequent lawsuit

does not constitute prejudice for purposes of Rule 41(a)(2). *See Davis*, 819 F.2d at 1274.

For the reasons given, the judgment of the district court is affirmed.

AFFIRMED

CONCUR

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and in part III of the majority's opinion. The majority, relying on our 1988 decision in *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988), interprets South Carolina law to mean that the term "damages" in an insurance contract generally refers to legal damages and not to equitable relief. South Carolina law, however, has not remained static since 1988, and it now appears that "damages" can include equitable relief in some instances. At the very least, the question is unsettled. I therefore respectfully decline to join parts I and II of the majority's opinion. Regardless of the state of South Carolina law on the legal/equitable distinction, contract terms are nevertheless limited to their ordinary, plain meaning. Here, the underlying lawsuits do not seek "damages" in the plain sense of the word: they do not seek compensation for past injuries. Accordingly, I vote to affirm the judgment.

I.

The majority cites *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (S.C. Ct. App. 1989), as an indication that the legal/equitable distinction in *Milliken* has been reaffirmed by the South Carolina courts. *Braswell* does cite *Milliken* with approval, but not for the proposition that "damages" means legal damages. Indeed, the ultimate holding in *Braswell* appears to conflict with *Milliken*'s legal/equitable distinction. To the extent that South Carolina case law deviates from or contradicts our holding in *Milliken*, we must defer to the courts of South Carolina. *See Gooding v. Wilson*, 405 U.S. 518, 526 n.3, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).

In *Braswell* the South Carolina Court of Appeals was presented with an action by the lessor of property who sought a declaration that his former lessee's insurance policy covered costs for the removal of stored chemicals from the property and costs for a government-ordered cleanup of a chemical spill on the property. *Braswell*, 387 S.E.2d at 708-09. The insurance contract in *Braswell*, like the contract here, limited coverage to lawsuits seeking "damages" resulting from "property damage" and did not define the term "damages." *Id.* at 709. The trial court had dismissed all of the lessor's claims as falling outside the definition of "property damage." *Id.* at 710. In addition, the trial court had held that the lessor's lawsuit "was restitutionary in nature because it was an attempt to restore the status quo," and therefore the suit sought only equitable relief, which did not count as a suit seeking "damages." *Id.*

On appeal the lessor in *Braswell* sought to distinguish *Milliken* by arguing that his action was "not a suit for restitution or equitable relief but . . . a suit for damages for breach of contract." *Id.* at 711. The South Carolina Court of Appeals brushed aside the question of whether the suit was legal or equitable, saying, "[c]all it what you may, the underlying issue is whether [the lessee's] insurer must indemnify under its policy for the costs incurred in complying with a government directive." *Id.* The court resolved this coverage issue by looking at whether the suit sought costs associated with remediating past or future injuries. As to stored chemicals that had "not yet caused physical injury to property," the court held: "under the authority of [*Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987),] and *Milliken and Company* . . . the costs of removal of the stored waste is [sic] not covered." *Id.* As to the costs of the government ordered cleanup of the chemical spill, the court held that "an occurrence causing property damage did result . . . as to the . . . damages directly related to the contamination of the land by [the] spill [of the 1000 gallons of chemicals]." *Id.* The South Carolina Court of Appeals reversed the trial court on this one issue, concluding that the costs associated with cleanup of the chemical spill were covered under the insurance policy. *Id.* While the court did not say so explicitly, it necessarily determined that these costs constituted "damages" as that term was used in the policy. *Cf. Hazen Paper Co. v. USF&G*, 407 Mass. 689, 555 N.E.2d 576, 582-83 (Mass. 1990) (holding that costs for removal of 115 drums of hazardous materials were not covered because no damage had occurred, but that costs for a government-ordered cleanup of spilled hazardous materials were "damages" and therefore covered).

Thus, *Braswell* cites *Milliken* approvingly for the idea that "future response costs" do not constitute "damages" because no physical injury has yet occurred. *Compare Braswell, 387 S.E.2d at 711, with Milliken, 857 F.2d at 980.* Nevertheless, *Braswell* in effect rejects *Milliken*'s categorical rule excluding equitable relief from the term "damages" because *Braswell* awarded coverage for environmental cleanup costs that the trial court had categorized as equitable relief. *See* Nancy W. Monts, *Insurance Coverage for Superfund Claims: Are Response Costs Recoverable Damages?*, 41 S.C. L. Rev. 871, 878-79 (1990) (noting that the holding in *Braswell* implicitly contradicts *Milliken*'s legal/equitable distinction).

Neither the South Carolina Supreme Court nor its Court of Appeals has fully addressed whether "damages" can include equitable relief in the insurance context. In this case, the result is the same whether we interpret the term "damages" to mean only "legal damages" or simply to mean compensation for past injury. The interpretation chosen, however, can make a difference in other contexts. For example, the question of whether the term "damages" in an insurance contract encompasses equitable environmental cleanup costs is an intensely disputed area of state contract and insurance law. *See, e.g., Braswell*, 300 S.C. 338, 387 S.E.2d 707; *Boeing Co. v. AETNA Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507, 515 (Wa. 1990) (rejecting a federal court's prior interpretation of Washington law and stating, "we agree with the majority of cases across the country that the plain meaning of damages does not distinguish between sums awarded on a 'legal' or 'equitable' basis and that the plain meaning of damages may include cleanup costs to the extent that these costs are incurred

because of property damage."); *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997); *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (Md. 1993). Because this case may be resolved on an alternate and well-established ground, I would not apply our rule in *Milliken*, which appears to be in conflict with the result in *Braswell*.

II.

The legal/equitable distinction aside, the lawsuits underlying this case still do not seek "damages" as that term is commonly understood. South Carolina law provides that a term in an insurance contract, as in contracts generally, should not be expanded beyond "its plain, ordinary and popular meaning." *State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 478 S.E.2d 831, 832 (S.C. 1996). The term "damages" is ordinarily meant to include "the estimated reparation in money for detriment or injury sustained." *Webster's Third New Int'l Dictionary of the English Language* 571 (1989); *see also Farmland Industries*, 941 S.W.2d at 508; *Bausch & Lomb*, 625 A.2d at 1032 (rejecting this court's statement of Maryland law in *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987)).

Here, the underlying lawsuits seek an injunction to abate a nuisance, restitution, disgorgement of profits, civil penalties, attorneys' fees, costs, and contribution to a fund to monitor gun dealers. None of these remedies would repair or compensate for injuries sustained in the past by victims of gun violence. An injunction to abate a nuisance, specifically, one requiring changes in the methods of distributing and marketing firearms, is forward looking relief to prevent future

harm, not relief to redress past harm. Likewise, monies for a fund to monitor gun dealers are not costs of past injuries, nor are attorneys' fees and court costs. Civil penalties are fines payable to the government to punish and deter bad conduct, not payments of the costs of an injury or harm. In some cases, equitable relief in the form of restitution or disgorgement is used to restore damaged property or goods, as in the case of environmental cleanup, and thus the relief may fall within the ordinary meaning of "damages." *See Bausch & Lomb*, 625 A.2d at 1032-33 (environmental cleanup costs required by the government's restitutionary claims fall within the common usage of "damages"). Here, however, the gun makers' and distributors' revenue that would be subject to restitution and disgorgement would be paid into public treasuries. There is no indication that the funds would be paid to the victims of gun violence. Therefore, the restitution and disgorgement is not sought to compensate for or repair past injuries. All in all, because the underlying lawsuits do not seek "damages" in the ordinary sense, I concur in the judgment affirming the award of summary judgment to the defendant-insurers on the duty to defend claim.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1130, No. 00-2533

[Filed, April 23, 2001]

Ellett Brothers, Incorporated,
Plaintiff-Appellant,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellees,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

Ellett Brothers, Incorporated,
Plaintiff-Appellee,

v.

United States Fidelity & Guaranty Company; Fidelity and Guaranty Insurance Underwriters, Incorporated; St. Paul Mercury Insurance Company,
Defendants-Appellants,

and

International Insurance Company; RLI Insurance Company; Mount Hawley Insurance Company; United National Insurance Company,
Defendants.

American Insurance Association; National Shooting Sports Foundation; National Association of Independent Insurers,
Amici Curiae.

ORDER

Appellant has filed a motion for certification of questions of law to the South Carolina Supreme Court. The American Insurance Association, the National Association of Independant Insurers and the National Shooting Sports Foundation have filed motions for leave to participate as Amici Curiae and for leave to file responses to the motion for certification, with proposed responses. The National Shooting

Sports Foundation has also filed motion for leave to file a substitute disclosure form under seal. Appellees have filed responses to these motions.

The Court denies appellant's motion for certification of questions of law, grants the motions for leave to participate as Amici Curiae and accepts for filing the proposed responses. The Court denies the motion of the National Shooting Sports Foundation for leave to file substitute disclosure form under seal.

FOR THE COURT,

/s/ _____
Patricia S. Connor
CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

C.A. No. 3:00-1269-19

[Filed December 5, 2000]

Ellett Brothers, Incorporated, Plaintiff,	)
v.	)
United States Fidelity & Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc.) St. Paul Mercury Insurance Company, International Insurance Company, RLI Insurance Company, Mt. Hawley Insurance Company, United National Insurance Company, Defendants,	)

ORDER

This case is before the Court on St. Paul's motion for summary judgment.[1] St. Paul seeks a declaration that, as a

[1] Consistent with the parties' memoranda, the Court's collective reference to "St. Paul" includes defendants St. Paul

matter of law, it has no obligation to defend plaintiff in four separate pending lawsuits.[2] After carefully reviewing the record and the controlling legal principles, the Court concludes that the motion should be granted.

"[T]he determination whether a liability insurance company is obligated to defend an action under the policy provisions is based on the allegations of the complaint. If the a leged facts in the complaint fail to bring the case within the policy coverage, the insurer is free of the obligation to defend."[3] Conversely, "[a] liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy."[4] The dispositive issue here hinges on whether the relief sought in the underlying lawsuits constitutes "damages payable under the terms of the policy."

The applicable insurance contracts state in pertinent part that St. Paul will pay "those sums that [plaintiff] becomes legally obligated to pay as damages. . . . " In *Cincinnati*

Mercury Insurance Company, United States Fidelity & Guaranty Company, and Fidelity & Guaranty Insurance Underwriters, Inc.

[2] By prior Order, the Court permitted plaintiff to withdraw its request for indemnity without prejudice.

[3] *First Fin. Ins. Co. v. Sea Isl. Sport Fishing Soc'y, Inc.*, 490 S.E.2d 257, 258 (S.C. 1997) (citation omitted).

[4] *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 514 S.E. 2d 327, 330 (S.C. 1999).

Insurance Company v. Milliken and Company,[5] the Fourth Circuit interpreted the term "damages" in the context of South Carolina insurance law relating to liability policies and held:

> In the insurance context the word "damages" is not ambiguous. It means legal damages. As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" would not cover claims for which the insured is equitably obligated to pay.

St. Paul contends, and the Court concludes, that under this interpretation of South Carolina law, *which the Court is bound to follow,* St. Paul does not have a duty to defend plaintiff in the four pending lawsuits because the relief sought in those cases is equitable in nature and, therefore, does not constitute damages.[6]

---

[5] 857 F. 2d 979, 981 (4th Cir. 1988) (citation omitted.)

[6] Although plaintiff argues that prayers for interest, costs, and attorneys fees create the possibility of an award of "damages," the Court finds this argument foreclosed by the "Supplementary Payments" provisions of St. Paul's contracts.

Without presenting any significant rationale, plaintiff argues at length[7] that the Court must reject the Fourth Circuit's interpretation of South Carolina law as expressed in *Cincinnati Insurance Company*.[8] However, and it really should go without having to be said, the Court is not at liberty to reject controlling precedent from the Fourth Circuit in such a cavalier manner.[9] On appeal, the Fourth Circuit will have ample opportunity to revisit *Cincinnati Insurance Company,* and that court may take whatever steps it deems appropriate concerning its own precedent. Until such time (if ever) that the Fourth Circuit overrules *Cincinnati Insurance Company* (or until there is some positive sign from the Supreme Court of South Carolina that *Cincinnati Insurance Company* incorrectly states the law), the Court will continue to apply the case as it has done here.

Based on the foregoing, the Court hereby **ORDERS** on this the 5th day of December, 2000, at Columbia, South Carolina, that the motion for summary judgment be **GRANTED**.

---

[7] The Court does not condone plaintiff's filing of 2 supplemental memorandums in opposition to the motion for summary judgment.

[8] Plaintiff has previously requested that the Court certify a question of law to the Supreme Court of South Carolina, thus allowing that court to review *Cincinnati Insurance Company*.

[9] This Court's duty to follow Fourth Circuit precedent is not diminished simply because the precedent involves an interpretation of state law. *See FDIC v. Abraham*, 137 F. 3d 254, 268-69 (5th Cir. 1998).

/s/ _____
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3:00-1269-19

[Filed October 25, 2000]

Ellett Brothers, Incorporated, Plaintiff,	)
v.	)
United States Fidelity & Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc. St. Paul Mercury Insurance Company, International Insurance Company, RLI Insurance Company, Mt. Hawley Insurance Company, United National Insurance Company, Defendants,	)

DENIED

/s/_____ 10/25/00
Dennis W. Shedd Date
United States District Judge

MOTION FOR CERTIFICATION OF QUESTION OF LAW

Pursuant to Rule 228 of the South Carolina Appellate Court Rules, the plaintiff Ellett Brothers, Inc. hereby moves this Court for an Order certifying the following question of law to the South Carolina Supreme Court.[1] *S.C.R.C.P. 228.*

> Under South Carolina law, and the relevant insurance policies, do the claims asserted in the underlying complaints against Ellett Brothers constitute claims for "damages," thus creating the possibility of coverage and triggering the insurers' duty to defend?

The bases for this Motion are that this issue may be determinative of the action pending before this Court and there is no controlling precedent in the decisions of the South Carolina Supreme Court. Therefore, for these reasons, this issue should be certified to the South Carolina Supreme Court for review and interpretation.

---

[1] The procedure for certifying questions of law to a state's Supreme Court is governed by state law. *See Luck v. GSSW Ltd. Partnership*, 131 F. 3d 135 (4th Cir. 1997).